In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 830

STRICKLAND TRANSPORTATION CO., INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16 (1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court dismissing an action brought by appellant to set aside and prohibit enforcement of an order of the Interstate Commerce Commission in its Docket No. MC-C-4472, *Central Freight Lines, Inc. v. Strickland Trans. Co., Inc.* (U.S. App. F, 102 M.C.C. 291).[1] The Commission's

[1] This report embraced No. MC-109680 (Sub-No. 117), *Strickland Transp. Co., Inc. Extension—Louisiana Points.*

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order amended appellant's certificate of public convenience and necessity for motor vehicle carriage to make it conform to a prior judicial decision with regard to the service authorized for Houston, Beaumont, and Orange, Texas (J.S. App. F).

On June 21, 1954, appellant applied for a certificate of public convenience and necessity authorizing operation as a general commodities common carrier between Houston, Texas, and New Orleans, Louisiana. On October 14, 1958, the Commission granted the certificate, essentially as sought by appellant, including the servicing of all intermediate points along the route between Houston and New Orleans (J.S. 143). Several motor vehicle common carriers who served cities along the Texas portion of that route brought a timely action for review of the Commission's order. On August 1, 1960, the district court affirmed the Commission's order in most part but set aside that portion which authorized appellant's service between Houston and Beaumont-Orange, Texas, and points intermediate thereto (J.S. App. H). *T.S.C. Motor Freight Lines Inc., et al.* v. *United States, et al.*, 186 F. Supp. 777 (S.D. Tex. 1960), affirmed *per curiam sub nom. Herrin Transportation Co.* v. *United States, et al.*, 366 U.S. 419.

In remanding the matter to the Commission, the district court stated, in quite specific terms, the restrictions to be put on appellant's authority:

> As the case has to be remanded to the Commission with respect to this phase, we do not undertake to set this forth in terms having the

precision of a certificate. But under our holding, except for Strickland's existing authority, the applicants will not be permitted to engage in the following transportation:

(1) Service from or through Houston destined to Beaumont or any point between Houston and Beaumont, or in the reverse direction,

(2) service from or through Houston destined to Orange or any point between Houston and Orange, or in the reverse direction,

(3) service from points east of Orange-Beaumont destined to any *intermediate point between* Orange-Beaumont and Houston, or in the reverse direction. (This would not restrict, for example, a shipment from Baton Rouge to Orange or Beaumont, or the reverse.)[*]

Acting with the express purpose of complying with the decree of the court, the Commission modified appellant's certificate to revoke authority for serving intermediate points in Texas except for: "Serving the intermediate points of Orange and Beaumont, Tex., restricted to traffic moving to or from points east of the Texas-Louisiana State line" (J.S. 83). The Commission's order was issued on March 15, 1961, and no timely petition for reconsideration was filed.

The present controversy arose in 1964 when appellant instituted service *through* Houston between Orange-Beaumont and points east of a northerly extension of the Texas-Louisiana line but north of the Arkansas-Louisiana line, for example, moving ship-

[*] 186 F. Supp. 777, 794 n. 42 (S.D. Tex.).

ments from St. Louis, Missouri, through Houston to Beaumont. On June 1, 1964, several interested motor carriers and railroads (intervening appellees in this Court) filed a complaint with the Commission alleging a violation of appellant's certificate and praying for a cease and desist order, or, in the alternative, a further modification of the certificate to make more specific its compliance with the mandate of the court (J.S. 29-30).[3] The hearing examiner concluded that appellant was operating beyond the authority of its certificate and recommended a cease and desist order (J.S. 65). The Commission rejected that recommendation on the ground that the modified certificate, by its terms, permitted the service complained of (J.S. 70). Since this result would have been inconsistent with the district court's mandate not to permit movements through Houston, the Commission concluded that it had no alternative but to issue a second amended certificate (J.S. 71).

Appellant thereupon brought this action to set aside and enjoin the decision and order of the Commission. The statutory three-judge court determined, one judge dissenting, that the Commission expressly intended to follow the mandate of the district court in modifying appellant's certificate on remand in 1961; that the Commission's 1961 modification was inconsistent with the mandate of the district court; that

[3] A separate petition seeking solely to reopen the Sub-No. 117 proceeding was also filed on May 31, 1964. After extensive pleadings were filed by all parties, the Commission denied the separate petition in September 1964, having previously set the complaint for disposition under modified procedures.

the Commission became bound to correct this error; that the Commission had the authority to modify the certificate, and indeed would have been recreant if it had not done so; and that the Commission did not have to comply with the hearing provisions of § 212(a) of the Interstate Commerce Act, 49 U.S.C. § 312(a), in correcting its inadvertent mistake (J.S. App. A). The district court approved the order of the Commission (J.S. 35) and dismissed appellant's complaint (J.S. App. D).

ARGUMENT

The decision below is correct, and this appeal does not present a substantial question warranting plenary review by the Court. The sole issue decided below was whether the Commission after full administrative proceedings properly exercised its authority to revise a certificate of public convenience and necessity to comport with the mandate of a three-judge district court.

It is well settled law that when a court has exercised jurisdiction to review and suspend a report and order of an administrative agency, the agency must comply with the court's order. *Inland Steel Co. v. United States*, 306 U.S. 153, 160. Section 212(a),[1] which re-

[1] Section 212(a) provides, in pertinent part:

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may, after notice and hearing, be suspended, changed, or revoked in whole or in part, for willful failure to comply

quires the Commission to hold hearings prior to modification under certain circumstances, is a limitation on the independent powers of the Commission but not upon the powers of a federal court or, by implication, those of the Commission in carrying out a court remand. See *Asbury Transportation Co.* v. *United States*, 236 F. Supp. 322 (S.D. Calif. 1964). The purpose of the Commission's second modification of the certificate was merely to correct an error of inadvertence in framing the first modification, and not to effectuate any intervening change in policy, which would have required a hearing under § 212(a). *American Trucking Assns.* v. *Frisco Co.*, 358 U.S. 133. It is not material that *Frisco* involved a ministerial error of the Commission's staff, while this case concerns a failure of draftsmanship. It is plain from the Commission's express intention to conform the certificate to the mandate of the first court that its failure to choose language adequate to achieve that purpose was inadvertent, and the court below so found (J.S. 35). See also *Willey* v. *United States*, 245 F. Supp. 669 (E.D. Ill. 1965); *James J. Williams, Inc.* v. *United States*, 241 F. Supp. 585 (E.D. Wash. 1965).

Finally, appellant was not prejudiced by reason of the Commission's failure to invoke § 212(a). As the court below found, appellant was placed on notice by the complaint of intervening appellees that the con-

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with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license. * * *

troversy before the Commission would center upon whether the amended certificate conformed to the mandate of the first three-judge court, and participated fully in hearings in which the proper interpretation of footnote 42 was considered (J.S. 29-30, 35, 36).

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

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DECEMBER 1967.

U.S. GOVERNMENT PRINTING OFFICE: 1967